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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 EDGAR L. MOORE,

11 Plaintiff,

12 RYAN D. MCCARTHY, Acting  
Secretary of the Army,

13 Defendant.  
14

CASE NO. 19-cv-5055-RJB

ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS

15 This matter comes before the Court on Defendant's Motion to Dismiss (Dkt. 19). The  
16 Court is familiar with the motion, materials filed in opposition and support thereto, and the  
17 remainder of the record herein. For the reasons set forth below, the motion should be granted.

18 **I. BACKGROUND & RELEVANT FACTS**

19 **1. RELEVANT FACTS**

20 Plaintiff, proceeding pro se, alleges that his former employer, at the Community  
21 Recreation Division, Department of Army Directorate of Family, Morale, Welfare, and  
22 Recreation, at Joint Base Lewis-McCord, discriminated against him based on his race and  
23 disability. Dkt. 3, at 2–5. Plaintiff worked as a fitness center facility manager. Dkt. 3, at 57.  
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1 Although unclear from the record, it appears that Plaintiff may still work for Defendant. *See*,  
2 *e.g.*, Dkt. 3, at 57 (providing that Plaintiff currently works for the federal government).

3 Plaintiff's complaint was completed on a form. Dkt. 3. Plaintiff indicates on the form, in  
4 the Basis for Jurisdiction section, that his claims are brought forth under Title VII of the Civil  
5 Rights Act of 1964 ("Title VII"), as codified, 42 U.S.C. §§ 2000e to 2000e-17, and the  
6 Americans with Disabilities Act of 1990 ("ADA"), as codified, 42 U.S.C. §§ 12112 to 12117.  
7 Dkt. 3, at 3–4. The form provides that the discriminatory conduct of which Plaintiff complains  
8 includes failure to accommodate his disability and unequal terms and conditions of employment.  
9 Dkt. 3, at 4. On the form's Statement of Claim section, Plaintiff wrote only, "See attached." Dkt.  
10 3, at 4. On the form's statement of facts section, Plaintiff wrote only, "see attachments." Dkt. 3,  
11 at 5. Attached to the complaint are 70 pages of various forms, administrative records, letters, and  
12 other documents related to Plaintiff's claims. Dkt. 3, at 8–77.

## 13 **2. PROCEDURAL HISTORY**

14 The complaint's attachments indicate that Plaintiff filed a formal discrimination  
15 complaint with the Army on September 10, 2013. Dkt. 3, at 72. Plaintiff alleged discrimination  
16 on the basis of his race and disability. Dkt. 3, at 72–73. Plaintiff claimed that he was subject to  
17 disparate treatment and a hostile work environment when his supervisor:

- 18 (1) Flicked a paper in his face in June 2012;
- 19 (2) Counseled him for missing a scheduled athletic event on June 18, 2014;
- 20 (3) Questioned his ability to manage the fitness center in July 2014; and
- 21 (4) Asked his coworker on July 8, 2014, whether he really had mental and physical  
22 disabilities.

1 Dkt. 3, at 73.<sup>1</sup>

2 Plaintiff requested a hearing before an administrative judge (“AJ”) for the Equal  
3 Employment Opportunity Commission (“EEOC”). Dkt. 3. Defendant filed a Motion for a  
4 Decision Without a Hearing on October 13, 2016. Dkt. 3. The AJ found no discrimination and  
5 granted Defendant’s Motion for a Decision Without a Hearing on March 18, 2018. Dkt. 3.

6 The AJ found that no one in management knew about Plaintiff’s disabilities at the time of  
7 the alleged incidents and that Plaintiff’s disabilities could not have been the basis or motive for  
8 the alleged incidents. Dkt. 3, at 67–68. The AJ found that Plaintiff presented no evidence  
9 connecting any of the alleged incidents with Plaintiff’s race or disability and that the alleged  
10 paper-flicking was too remote in time from the 2014 incidents to be considered part of a pattern  
11 of harassment. Dkt. 3, at 67–68.

12 Plaintiff appealed the AJ’s decision to the EEOC’s Office of Federal Operations  
13 (“OFO”). Dkt. 3, at 72. On October 18, 2018, the EEOC OFO affirmed the AJ’s decision  
14 dismissing the complaint. Dkt. 3, at 74. The EEOC OFO decision included a Notice of Right to  
15 Sue letter. Dkt. 3, at 75.

16 On January 17, 2019, Plaintiff filed his complaint with the Court, along with a request to  
17 proceed *in forma pauperis* (“IFP”). Dkt. 1. The Court denied Plaintiff’s request to proceed IFP.  
18 Dkt. 2. Plaintiff filed an amended complaint (the operative complaint) on March 7, 2019. Dkt. 3.

### 19 **3. PENDING MOTION**

20 On October 9, 2019, Defendant filed the instant Motion to Dismiss, offering three  
21 primary arguments for dismissal of Plaintiff’s claims:

22 (1) The Court lacks jurisdiction over Plaintiff’s Americans with Disabilities Act

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24 <sup>1</sup> These alleged incidents are collectively referred to throughout this opinion as the “four alleged incidents.”

1 (“ADA”) claim because the ADA does not apply to federal employers. Rather,  
2 Plaintiff must seek relief pursuant to the Rehabilitation Act of 1973 (“Rehabilitation  
3 Act”).<sup>2</sup>

4 (2) Plaintiff failed to timely file suit.

5 (3) Plaintiff fails to set forth sufficient facts to demonstrate a plausible claim for race and  
6 disability discrimination.

7 Dkt. 19.

8 On October 10, 2019, the Court issued Plaintiff a warning regarding Defendant’s instant  
9 Motion to Dismiss. Dkt. 21.

10 On October 17, 2019, Plaintiff filed a partial response in opposition to the instant Motion  
11 to Dismiss. Dkt. 22. Plaintiff’s partial response asserted that the motion should be denied as to its  
12 request for dismissal on grounds of untimeliness. Dkt. 22. Plaintiff did not otherwise respond to  
13 the motion to dismiss and requested an extension to the response deadline so that he could obtain  
14 the assistance of legal counsel. Dkt. 22.

15 On November 7, 2019, the Court denied, in part, the instant Motion to Dismiss only as to  
16 the issue of whether Plaintiff untimely filed suit. Dkt. 24. The Court granted Plaintiff’s request  
17 for an extension of time to the response deadline and renoted the remaining issues of the Motion  
18 to Dismiss for January 3, 2020. Dkt. 24. Plaintiff’s Response was due December 30, 2019. Dkt.  
19 29, at 2.

20 On January 2, 2020, Plaintiff untimely filed a response. Dkt. 26. Plaintiff requested a  
21 second extension to the response deadline to continue seeking the assistance of legal counsel.

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24 <sup>2</sup> For purposes of the instant motion, Defendant discusses Plaintiff’s claims as though they were brought  
under the Rehabilitation Act. Dkt. 19.

1 Dkts. 26; and 28. Defendant opposed Plaintiff's request for more time. Dkt. 27. The Court  
2 granted Plaintiff's request for more time and renoted the Motion to Dismiss for January 31,  
3 2020. Dkt. 29.

4 On January 29, 2020, Defendant filed a reply. Dkt. 30. The reply contends, in part, that  
5 Plaintiff has failed to respond to Defendant's Motion to Dismiss. Dkt. 25. Defendant writes that  
6 "[n]o attorney has entered an appearance on behalf of Plaintiff. Plaintiff, either *pro se* or through  
7 legal counsel, has not filed a response or opposition to Defendant's motion to dismiss, which  
8 should have been filed by January 27, 2020." Dkt. 30, at 2.

9 Plaintiff untimely filed a Response to the Motion to Dismiss on January 30, 2020  
10 (entered on January 31, 2020). Dkt. 31. Plaintiff's response offers two primary arguments: (1)  
11 that the Court has jurisdiction; and (2) that Plaintiff has set forth sufficient facts to demonstrate  
12 plausible claims for race and disability discrimination. Plaintiff further contends that the record  
13 makes reference to only a few instances of employer abuse but that Plaintiff had been subjected  
14 to many more instances "of a harassing nature, racist comments and derogatory comments about  
15 [his] national origin." Dkt. 31, at 7.

16 The Court renoted the instant motion for a third time to February 12, 2020, to give  
17 Defendant an opportunity to file a reply brief following Plaintiff's untimely response. Dkt. 32.  
18 On February 7, 2020, Defendant filed a reply brief. Dkt. 33.

#### 19 **4. ORGANIZATION OF THE OPINION**

20 First, the Court discusses *pro se* standards. Second, the Court discusses general standards  
21 of what a complaint must contain. Third, the Court discusses motion to dismiss standards.  
22 Finally, the Court discusses Plaintiff's disparate treatment and hostile work environment claims.  
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## II. DISCUSSION

### A. PRO SE STANDARDS

When a plaintiff proceeds pro se, a district court is required to afford plaintiff the benefit of any doubt in ascertaining what claims plaintiff raised in the complaint and argued to the district court. *Alvarez v. Hill*, 518 F.3d 1152, 1158 (9th Cir. 2008), (citing *Morrison v. Hall*, 261 F.3d 896, 899 n.2 (9th Cir. 2001)); *see also Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988) (pleadings of pro se civil rights plaintiff to be construed liberally, affording plaintiff benefit of any doubt).

Because plaintiff filed this complaint pro se, the court has construed the pleadings liberally and has afforded plaintiff the benefit of any doubt. *See Karim-Panahi*, 839 F.2d at 623. However, “[p]ro se litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record.” *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986).

### B. GENERAL RULES OF PLEADING

A complaint stating a claim for relief must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Here, the operative complaint is difficult to understand and does not satisfy the rule. *See* Dkt. 3. The complaint’s 70-page attachment of various documents is unwieldy and disorganized. *See* Dkt. 3. Nevertheless, the Court has reviewed and is familiar with the complaint and its attached documents.

### C. STANDARDS FOR A MOTION TO DISMISS

A complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) if, considering the factual allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the Constitution, laws, or treaties of the United States, or does not fall within one of the other enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or

1 controversy within the meaning of the Constitution; or (3) is not one described by any  
2 jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v.*  
3 *Tinnerman*, 626 F.Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal  
4 question jurisdiction) and 1346 (United States as a defendant). When considering a motion to  
5 dismiss pursuant to Rule 12(b)(1), the court is not restricted to the face of the pleadings but may  
6 review any evidence to resolve factual disputes concerning the existence of jurisdiction.  
7 *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052  
8 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). A federal court  
9 is presumed to lack subject matter jurisdiction until plaintiff establishes otherwise. *Kokkonen v.*  
10 *Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *Stock West, Inc. v. Confederated*  
11 *Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, plaintiff bears the burden of proving the  
12 existence of subject matter jurisdiction. *Stock West*, 873 F.2d at 1225; *Thornhill Publishing Co.,*  
13 *Inc. v. Gen'l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

14 Fed. R. Civ. P. 12(b) motions to dismiss may be based on either the lack of a cognizable  
15 legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri*  
16 *v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken  
17 as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d  
18 1295 (9th Cir. 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not  
19 need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement  
20 to relief requires more than labels and conclusions, and a formulaic recitation of the elements of  
21 a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007)  
22 (internal citations omitted). “Factual allegations must be enough to raise a right to relief above  
23 the speculative level, on the assumption that all the allegations in the complaint are true (even if  
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1 doubtful in fact).” *Id.* at 555. The complaint must allege “enough facts to state a claim to relief  
2 that is plausible on its face.” *Id.* at 547.

3 **D. PLAINTIFF’S DISPARATE TREATMENT AND HOSTILE WORK**  
4 **ENVIRONMENT CLAIMS**

5 The United States has waived its sovereign immunity for employment discrimination  
6 claims under various federal anti-discrimination statutes. Title VII provides the exclusive remedy  
7 for discrimination claims based on race, color, religion, sex, and national origin. *Brown v. Gen.*  
8 *Servs. Admin.*, 425 U.S. 820, 835 (1976). Additionally, the Rehabilitation Act provides the  
9 exclusive remedy for employment discrimination claims based on disability. *Johnson v. Horne*,  
10 875 F.2d 1415, 1420 (9th Cir. 1989), *overruled on other grounds by Irwin v. Dep’t of Veterans*  
11 *Affairs*, 498 U.S. 89 (1990).

12 The operative complaint provides that Plaintiff’s claims are brought forth under Title VII  
13 and the ADA. Dkt. 3, at 3–4. But the exclusive remedy for a federal employee claiming disability  
14 discrimination is under the Rehabilitation Act. *Johnson*, 875 F.2d at 1420. In Plaintiff’s response  
15 brief, he argues that he is a NAF (nonappropriated funds) employee of the Department of  
16 Defense and therefore should not be considered a federal employee. Dkt. 31.

17 Plaintiff’s NAF argument is without merit. Plaintiff apparently points to the NAF  
18 employee handbook, which provides, “Although you are a federal employee of the Department  
19 of Defense, .... NAF employees are not deemed federal employees for the purposes of laws  
20 administered by the Office of Personnel Management (OPM), unless specifically stated or when  
21 administratively extended.” Dkt. 31, at 2. Plaintiff shows only that NAF employees are subject to  
22 different personnel and payroll systems than appropriated funds employees. *See* Dkt. 31. Below,  
23 for purposes of the instant motion, the Court discusses Plaintiff’s disability discrimination claims  
24 as though they were brought forth under the Rehabilitation Act.



1 Exhaustion of administrative remedies is a prerequisite to suit under both Title VII and  
2 the Rehabilitation Act. 42 U.S.C. § 2000e-16; *Vinieratos v. United States*, 939 F.2d 762, 767-75  
3 (9th Cir. 1991). Plaintiff's pleadings include several allegations not reflected in the complaint's  
4 attached administrative record. *See, e.g.*, Dkt. 31, at 6-7 (providing, in part, allegations that  
5 Plaintiff's supervisor subjected Plaintiff to racist comments, that Plaintiff's supervisor  
6 discriminated against him through unknown actions not included in the complaint, and that  
7 Plaintiff's supervisor harassed Plaintiff based on his national origin). The Court should not  
8 permit Plaintiff to use this case as an end run around the requirement that he exhaust his  
9 administrative remedies. *See Vinieratos*, 939 F.2d at 767-75. Therefore, the Court limits its  
10 discussion of Plaintiff's claims to the four alleged incidents for which Plaintiff has shown that he  
11 has exhausted his administrative remedies.

12 1. Disparate Treatment Claim

13 A plaintiff claiming disparate treatment must first establish a *prima facie* case that: (1) he  
14 belongs to a protected class; (2) he was performing his job according to the employer's  
15 expectations; (3) he was subjected to an adverse employment action; and (4) similarly situated  
16 individuals outside his protected class were treated more favorably. *See, e.g., Chuang v. Univ. of*  
17 *Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1123-24 (9th Cir. 2000). Defendant contests the third and  
18 fourth prongs of this test. Dkt. 19.

19 An adverse employment action in the context of a disparate treatment claim "is one that  
20 materially affects the compensation, terms, conditions, or privileges of ... employment." *Davis v.*  
21 *Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008) (internal citations omitted).

22 Plaintiff has not alleged that the four alleged incidents affected his compensation, hours,  
23 status, or other terms of employment; therefore, Plaintiff has not alleged that he was subjected to  
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1 an adverse employment action. Because Plaintiff has not satisfied the third prong (adverse  
2 employment action) of the test above, the Court need not discuss whether Plaintiff has  
3 established the fourth prong (that similarly situated individuals outside protected class were  
4 treated more favorably).

5 Therefore, Plaintiff has not pleaded sufficient facts to establish a disparate treatment  
6 claim.

7 2. Hostile Work Environment Claim

8 To establish a *prima facie* hostile work environment case, a plaintiff must show that: (1)  
9 he was subjected to verbal or physical conduct of a harassing nature based on his sex, race, or  
10 national origin; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or  
11 pervasive to alter the conditions of employment and create an abusive work environment.  
12 *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003). Defendant primarily contests  
13 the third prong of this test. Dkt. 19.

14 To determine if a work environment is sufficiently hostile or abusive, courts consider the  
15 “frequency of the discriminatory conduct; its severity; whether it is physically threatening or  
16 humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an  
17 employee’s work performance.” *Flores v. Verdugo*, 441 Fed. Appx. 454, 455 (9th Cir. 2011)  
18 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). The offensive conduct “must be  
19 extreme to amount to a change in the terms and conditions of employment[.]” *Faragher v. City*  
20 *of Boca Raton*, 524 U.S. 775, 788 (1998). “[S]imple teasing, offhand comments, and isolated  
21 incidents (unless extremely serious) will not amount to discriminatory changes in the terms and  
22 conditions of employment.” *Id.* (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S.  
23 75, 80 (1998)). “These standards for judging hostility are sufficiently demanding to ensure that  
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1 Title VII does not become a ‘general civility code.’” *Faragher*, 524 U.S. at 788 (quoting *Oncale*,  
2 523 U.S. at 80).

3 Plaintiff’s allegations do not demonstrate a hostile work environment. *See Vasquez*, 349  
4 F.3d at 642 (9th Cir. 2003) (holding that “allegedly harassing incidents, which occurred over the  
5 course of more than one year and only two of which contained racially related epithets, did not  
6 create a hostile work environment”). Plaintiff has not alleged severe and pervasive conduct  
7 connected to his race or disabilities. The four alleged instances do not describe any extremely  
8 offensive conduct amounting to a change in the terms and conditions of his employment.  
9 Although some of the conduct alleged by Plaintiff appears inappropriate, it does not describe  
10 extremely offensive conduct.

11 Therefore, Plaintiff has not pleaded sufficient facts to demonstrate a hostile work  
12 environment claim.

### 13 **5. CONCLUSION**

14 Plaintiff has not pleaded sufficient facts to support his disparate treatment and hostile  
15 work environment claims. Therefore, Defendant’s Motion to Dismiss (Dkt. 19) should be  
16 granted.

### 18 **III. ORDER**

19 Therefore, it is HEREBY ORDERED that:

- 20 • Defendant’s Motion to Dismiss (Dkt. 19) is **GRANTED**; and
  - 21 • This case is **DISMISSED**.
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1 The Clerk is directed to send copies of this Order to all counsel of record and to any party  
2 appearing *pro se* at said party's last known address.

3 Dated this 20<sup>th</sup> day of February, 2020.

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6 ROBERT J. BRYAN  
7 United States District Judge  
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